

THE NATIONAL LAW JOURNAL

FEBRUARY 13, 2012

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LITIGATION BOUTIQUES

HOT LIST

A Special Report

At this start-up

Formed in 2009, Goldman Ismail

BY SHERI QUALTERS

Goldman Ismail Tomaselli Brennan & Baum's founding partners came from two different firms and a corporate law department, but they were hardly strangers. Their common bonds included deep experience defending big pharmaceutical and medical-device companies in products liability cases and a commitment to alternative fee arrangements.

The boutique opened in 2009 with three former partners at Chicago's Bartlit Beck Herman Palenchar & Scott, two former Fulbright & Jaworski partners and managing partner Melissa Widen, who had been an associate at Chicago's Jenner & Block before working in-house at the fallen accounting firm Arthur Andersen.

"Everyone had known each other for a long time," Widen said. "The idea was to form a firm working with people you really liked and respected, and also to create something a little different."

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LITIGATION BOUTIQUE

HOT LIST

They may be small, but they command attention. The 10 law firms on our Litigation Boutiques Hot List, each fielding no more than 50 lawyers, demonstrate that when it comes to high-stakes cases it's all about skill, not size. Whether they're working on the plaintiffs' or defense side of big pharma, big oil, white-collar or agriculture matters, the lawyers practicing at these streamlined shops set precedents, righted wrongs or saved companies during 2012. —LEIGH JONES

GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP

For efficacy

Goldman Ismail Tomaselli Brennan & Baum is known as an effective ingredient for pharmaceutical companies lending off products liability cases, but the four-year-old shop has also been cultivating intellectual property and commercial clients.

Most of the 14-lawyer boutique's future growth will be in its Chicago home office, which moved into expanded digs last fall, managing partner Melissa Widen said. With more open space to encourage collaboration and the firm's reliance on alternative fee arrangements, "we're really free to work in any way we want to," she said. The firm also has offices in Dallas and Santa Monica, Calif.

Deep litigation expertise is also part of the winning formula. The founding partners' resumes list Fulbright & Jaworski and Chicago firms Bartlit Beck Herman

- Focus early in the litigation on what is the admissible evidence that supports your client's theory in the case.
- Credibility with judges and juries is earned and should not be assumed.
- Whenever possible, assume the role of a teacher, particularly when it comes to scientific evidence.

TAREK ISMAIL

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LITIGATION BOUTIQUES HOT LIST

At the 10 law firms spotlighted here, it's all about skill, not size. The lawyers at these litigation shops, all of which have fewer than 51 attorneys, are as clever at practicing on paper as they are at wooing a jury. Many of these lawyers have honed their craft at the biggest and best firms in the nation and have opted, once they've gained crucial work experience, for a small-firm career. We've highlighted the special strategies and creative approaches they used in 2013 to help set precedent, right wrongs and save the day for the client.



SHAYNA COOK

GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP

A Strategy

Soon after mineral company Imerys S.A. tapped Goldman Ismail Tomaselli Brennan & Baum for help with a products liability case against Johnson & Johnson and suppliers over talc-based products, the firm advised telling the judge that she got a ruling wrong.

Although not formally admitted to the case at that time, Goldman Ismail lawyers were the primary authors of a motion for reconsideration in the South Dakota federal case brought by a woman who claimed talc caused

TRIAL TIPS

■ Opening statements are about creating a favorable narrative for your client, not to preview or rebut every piece of evidence in the case.

—TAREK ISMAIL

■ Re-direct examination can be effective but tricky; don't wait until cross-examination to consider your plan for re-direct examination.

—TAREK ISMAIL

■ Effective cross-examination begins at the deposition phase—depositions of potential trial witnesses should be taken with the anticipated cross-examination in mind.

—SHAYNA COOK

THE NATIONAL LAW JOURNAL

FEBRUARY 2, 2015

An ALM Publication

LITIGATION BOUTIQUES HOT LIST

A SPECIAL REPORT | This week The National Law Journal highlights litigation firms that are small but powerful. We asked our readers to nominate firms with up to 50 attorneys that won important litigation during calendar year 2014—whether in monetary terms or by establishing precedents at the trial or appellate level—and supplemented those proposals with our own research to find the 10 firms named here.



GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM

Doing Things Differently From Bigger Firms

GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP

Goldman Ismail Tomaselli Brennan & Baum has "an uncanny ability to anticipate problems and manage risk," says Michael J. Palenchar, vice president and managing general counsel for litigation at Merck & Co. "They get across the finish line effectively and efficiently." He said of the firm's lawyers, "They are the best. They've been with me for six years ago. In the process, they produce an excellent work product and are very responsive to the needs of their clients."

Founded by former partners at Bartlit Beck Herman Palenchar & Scott and Fulbright & Jaworski, the firm has more than the bigger firms. With nine partners and 18 attorneys, the Chicago-based defense practice successfully litigated sprawling multidistrict litigation this year, including a \$1.5 billion products liability case, which involves claims by more than 3,000 plaintiffs. The firm also litigated a \$1.5 billion case in the United States. Goldman Ismail is

lead national counsel representing Bayer Healthcare LLC, manufacturer of the Mirena intrauterine contraceptive device. In 2014, the firm convinced the 8th U.S. judge in the Southern District of New York to treat a statute of limitations challenge as a test case and hear arguments in advance of discovery. The complaint ultimately was thrown out and the judge established an accelerated briefing schedule for the case. The firm has about 200 other cases.

THE NATIONAL
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LITIGATION BOUTIQUES
2012 HOT LIST

At this start-up, the billable hour is anathema

Formed in 2009, Goldman Ismail specializes in defending pharmaceutical and medical-device makers.

BY SHERI QUALTERS

Goldman Ismail Tomaselli Brennan & Baum's founding partners came from two different firms and a corporate law department, but they were hardly strangers. Their common bonds included deep experience defending big pharmaceutical and medical-device companies in products liability cases and a commitment to alternative fee arrangements.

The boutique opened in 2009 with three former partners at Chicago's Bartlit Beck Herman Palenchar & Scott, two former Fulbright & Jaworski partners and managing partner Melissa Widen, who had been an associate at Chicago's Jenner & Block before working in-house at the fallen accounting firm Arthur Andersen.

"Everyone had known each other for a long time," Widen said. "The idea was to form a firm working with people you really liked and respected, and also to create something a little different."

In fact, several of the lawyers had worked together on teams created by client companies, said founding partner Tarek Ismail. "We worked very

closely together and formed personal and professional bonds," he said.

The 13-lawyer Chicago boutique has established satellite offices in Dallas and Santa Monica, Calif., and added intellectual property and general complex commercial litigation to its services.

Hourly billing is anathema—the firm hasn't even bought timekeeping software, Widen said. "All of our fee structures are some type of alternative fee structure," Widen said.

The billing menu includes flat monthly fees combined with a potential bonus, phased-in fee agreements and fee cap agreements. The idea is to offer "a great deal of variety and flexibility" to clients, Ismail said. "We're at a size that we can be nimble in arranging any fee arrangement."

The firm doesn't disclose revenues or salaries, but Widen said it pays "at the top range of the legal market" and it serves *Fortune* 100 companies.

The firm sees to a full range of litigation matters for clients including divisions of Bayer Corp., Medtronic Inc., Merck & Co. Inc. and Pfizer Inc., and expects to continue working for

them, Widen said. "In 2 1/2 years, we've assembled a blue-chip roster of clients," Widen said. "We're a small firm, but we have a kind of practice that you'd see at an Am Law 100 firm." She referred to the annual list of the largest U.S. law firms by revenue compiled by *The American Lawyer*, an affiliate of *The National Law Journal*.

Approximately 60 percent of the firm's work involves pharmaceutical and medical-device cases; 30 percent intellectual property; and 10 percent general commercial matters.

Products liability work likely will remain a significant part of the practice, but the partners made a conscious decision to move into intellectual property law when it hired former Bartlit Beck partner Alan Littmann in May 2010, Ismail said.

"We think we have an expertise in presenting complex information to judges and juries, and we understood there was an opportunity to extend that expertise to patent litigation as well," Ismail said.

In November, for example, Littmann took the lead role in convincing a plaintiff to drop claims

against Major League Baseball's Internet arm, MLB Advanced Media L.P., in a Delaware federal multid defendant infringement case, *Walker Digital LLC v. Activision Blizzard Inc.*

Walker Digital filed suit in April against 23 companies, including some subsidiaries. Walker Digital claimed that the defendants infringed on two patents for technology related to electronic and online games. MLB didn't want to settle because it didn't believe it had infringed, so Littmann stood up to Walker Digital.

FRIENDLY WARNING

"We talked about what they were trying to do with us and how it could potentially backfire for the rest of the case," Littmann said. Plaintiffs that overreach on infringement claims can leave themselves vulnerable to invalidity claims, he said.

If resolving the case early doesn't work, then "we are perfectly capable of doing the alternative, which is to fight all the way through trial," he said.

Neither Walker Digital nor its lawyers at Agility IP Law in Menlo Park, Calif., and Bayard in Wilmington, Del., responded to requests for comment.

Regarding products liability, the firm took a leading role in the litigation against Merck over its Fosamax osteoporosis medication. Last year, the firm was lead counsel in two federal bellwether cases that the plaintiff voluntarily dismissed shortly before trial, *Hester v. Merck & Co.* and *Raber v. Merck & Co.*, both in the Southern District of New York.

The firm was co-trial counsel in the Southern District of New York bellwether case *Secrest v. Merck & Co.*, which ended with a complete defense victory for Merck in October. Plaintiff Linda Secrest claimed the drug caused severe jaw and dental problems.



The idea was to form a firm working with people you really liked and respected.

—MELISSA WIDEN

Goldman Ismail worked with lead trial counsel Chilton Varner, a partner at Atlanta's King & Spalding; Venable of Washington; and New York's Hughes Hubbard & Reed.

Varner said the Goldman Ismail team brought substantial medical knowl-

edge and enthusiasm for teamwork. "Because they are a small litigation boutique, they've got great flexibility," Varner said. "That's a good thing in today's litigation environment."

"This space is dominated by large firms," Ismail said. "Despite that, we have the confidence of our co-counsel and clients to be chosen as trial counsel."

Goldman Ismail's work on the Secrest case equalled that of any of the major firms that represent Merck in terms of quality, said the plaintiffs' lawyer Tim O'Brien, a partner at Levin Papantonio Thomas Mitchell Rafferty & Proctor of Pensacola, Fla.

"Really, when it gets down to it, when you deal with this level of litigation, it's more about the lawyers' intellect than about the size of the firm," O'Brien said.

Sheri Qualters can be contacted at squalters@alm.com.

THE NATIONAL LAW JOURNAL LITIGATION BOUTIQUE 2013 HOT LIST

For efficacious relief from pesky lawsuits

Goldman Ismail Tomaselli Brennan & Baum is known as an effective ingredient for pharmaceutical companies fending off products liability cases, but the four-year-old shop has also been cultivating intellectual property and commercial clients.

Most of the 14-lawyer boutique's future growth will be in its Chicago home office, which moved into expanded digs last fall, managing partner Melissa Widen said. With more open space to encourage collaboration and the firm's reliance on alternative fee arrangements, "we're really free to work in any way we want to," she said. The firm also has offices in Dallas and Santa Monica, Calif.

Deep litigation expertise is also part of the winning formula. The found-

ing partners' résumés list Fulbright & Jaworski and Chicago firms Bartlit Beck Herman Palenchar & Scott and Jenner & Block. Commercial litigation represents about 15 to 20 percent of the caseload, Widen said. About half is in pharmaceuticals and medical devices and the rest is in intellectual property.

In a multidefendant patent infringement case involving ticketing-software patents, *CEATS Inc. v. Continental Airlines Inc.*, the firm scored a summary judgment for client Tickets.com in February 2012. Goldman Ismail's unusual legal strategy involved a California state court challenge of CEATS' ownership of the patents, which it acquired through an asset purchase. Just before the March 2012 verdict found the patents invalid, Tickets.com and CEATS settled. "We were able on our counterclaims to get a very favorable settlement for our clients," said founding partner Tarek Ismail.

Goldman Ismail helped Merck & Co. Inc. avoid a trial in Florida state court on claims that the osteoporosis medication Fosamax caused osteonecrosis of the jaw. The plaintiff initially pushed hard for that venue—Florida is home to plaintiffs counsel at Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor,



MELISSA WIDEN AND TAREK ISMAIL

and one of the plaintiffs' children is a Florida judge. Shortly before the trial, however, the plaintiff side abandoned the state case in favor of multidistrict litigation pending in federal court; based on the federal judge's prior rulings, the move means punitive damages are unlikely, Widen said. She credited discovery work that undermined the plaintiff's science and medical witnesses for the venue shift.

Despite Goldman Ismail's relatively recent vintage, its lawyers bring plenty of bet-the-company experience to the table, said Merck vice president and assistant general counsel James Grasty. "Those guys exist to try cases; they do so incredibly effectively," Grasty said.

—SHERI QUALTERS

- Focus early in the litigation on what is the admissible evidence that supports your client's theory in the case.
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TAREK ISMAIL

THE NATIONAL LAW JOURNAL

LITIGATION BOUTIQUES **HOT LIST**

A Strategy Steeped in Bold Moves

Soon after mineral company Imerys S.A. tapped Goldman Ismail Tomaselli Brennan & Baum for help with a products liability case against Johnson & Johnson and suppliers over talc-based products, the firm advised telling the judge that she got a ruling wrong.

Although not formally admitted to the case at that time, Goldman Ismail lawyers were the primary authors of a motion for reconsideration in the South Dakota federal case brought by a woman who claimed talc caused her ovarian cancer. Imerys was one of several co-defendants in the case.

The motion asked U.S. District Judge Karen Schreier to change a ruling that allowed a civil conspiracy claim against Imerys, then Luzenac America Inc., to proceed to trial. The motion argued that the company had not conspired with others and that Imerys and Johnson & Johnson had a



First Amendment right to belong to a trade group that lobbies federal agencies about talc safety. The judge was persuaded and granted summary judgment to Imerys.

"Moving for reconsideration of anything is almost never successful," said partner and lead counsel for Imerys Shayna Cook, a partner at Goldman Ismail.

To go to a court and argue that the judge was wrong "can be pretty hard to do. Our team came up with a really creative argument," Goldman Ismail managing partner Melissa Widen said.

Taking bold steps following deep analysis is a hallmark of the 16-attorney Chicago-based firm. In just five years, it has established offices in Dallas and Santa Monica, Calif., and made a mark in mass tort, intellectual property and commercial litigation.

As lead counsel for Bayer HealthCare Pharmaceuticals Inc., the firm masterminded the removal of a 93-plaintiff case involving the intrauterine contraceptive device Mirena from Missouri state court to federal court. It's now part of multidistrict litigation. "Because of the law in Missouri courts, it's hard to find a way

FIRM FACTS

- **Founded:** 2009
- **Based:** Chicago
- **Total No. of Attorneys:** 16
- **Partners:** 9 ■ **Associates:** 6

to get from state court to federal court," Cook said. The firm decided to argue that one plaintiff, from the same state as Bayer's relevant operations, New Jersey, was fraudulently added to defeat diversity.

In general, the firm's case strategy "is geared not towards litigating but how it's going to be resolved on the merits. We do it the first moment we have a case," partner Tarek Ismail said. Ismail used that philosophy while defending Bayer HealthCare in multidistrict litigation over its Magnevist gadolinium dye used during MRI procedures.

The firm sold Bayer on a settlement program that disrupted its business much less than if it had continued litigating with the other defendants, Ismail said. Settlements and voluntary dismissals disposed of all but a half-dozen cases by the end of 2013.

Goldman Ismail is "a legitimate, credible threat to any case when they show up on the defense side," said Chris Seeger of New York-based Seeger Weiss, whose firm served on the plaintiffs' steering committee early in the gadolinium litigation.

—SHERI QUALTERS

TRIAL TIPS

■ Opening statements are about creating a favorable narrative for your client, not to preview or rebut every piece of evidence in the case.

—TAREK ISMAIL

■ Re-direct examination can be effective but tricky; don't wait until cross-examination to consider your plan for re-direct examination.

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LITIGATION BOUTIQUES

2015 HOT LIST

A SPECIAL REPORT

Doing Things Differently From Bigger Firms

Goldman Ismail Tomaselli Brennan & Baum has “an uncanny ability to assess problems and evaluate risk.” So says James Grasty, vice president and assistant general counsel for litigation at Merck & Co. “They get across the finish line effectively and efficiently,” Grasty said of the firm his company has used almost since Goldman Ismail’s inception six years ago. “In the process, they produce an excellent work product as well as a tangible economic benefit for their clients.”

Founded by former partners at Bartlit Beck Herman Palenchar & Scott and Fulbright & Jaworski, Goldman Ismail prides itself on doing things differently than the bigger firms. With nine partners and 18 attorneys, the Chicago-based defense practice successfully litigated sprawling multidistrict litigation last year, including the Mirena products liability case, which involves claims by more than 3,000 plaintiffs in courts across the United States. Goldman Ismail is lead national counsel

representing Bayer Healthcare LLC, manufacturer of the Mirena intrauterine contraceptive device.

In 2014, the firm convinced the MDL judge in the Southern District of New York to treat a statute of limitations challenge as a test case and hear arguments in advance of discovery. The complaint ultimately was thrown out and the judge established an accelerated briefing process for potential dismissal of about 200 other cases.

In a second win, Goldman Ismail convinced the Judicial Panel on Multidistrict Litigation to reject a plaintiff request to consolidate a series of cases alleging injuries caused by “idiopathic intracranial hypertension.” Such consolidation can exacerbate the pressure on defendants to settle as the risk of an unfavorable ruling rises—usually exponentially—with the case amalgamation. “This is one of the bigger mass torts going on in the country now, and you have a boutique law firm leading the defense for a multinational corporation,” founding partner Tarek Ismail said. “You won’t find another firm of our size being national counsel in a case as important as Mirena.”

One of the firm’s strategies has been to offer clients a distinctive depth of expertise, despite its small size, Ismail said. For example, two of the lawyers on the Mirena case hold medical degrees. “In a 1,000-lawyer firm, you’d be lucky to find one J.D./M.D.; we have three.”

“Tarek is able to evaluate all sides of an issue,



TODD WINTERS

TAREK ISMAIL

which is somewhat rare,” said Steve Skikos, a San Francisco plaintiffs’ lawyer who has faced off with the firm in a number of cases. “Most lawyers tend to see only their own side. He’s able to come up with a plan, stick to a plan and get the case resolved with results that both sides can live with,” he said.

In one dimension in particular—setting fees—Goldman Ismail has carved out its own path. The firm adopted from its start a fee structure based on its ability to assess the needs of a case and not run up unnecessary billable hours. “Their fee model reflects the high degree of confidence and experience with which they approach every case,” Merck’s Grasty said. “It really shows their willingness to partner with clients.”

—PAT WECHSLER

TRIAL TIPS

- Building credibility with the judge is as important as building credibility with the jury.
- Respect jurors’ and the court’s time by avoiding unnecessary repetition and presenting cumulative evidence.
- Focus on a limited number of core trial themes that will provide jurors with the conceptual framework for understanding key evidence.

—TAREK ISMAIL

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